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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KEVIN JAMES OVERTURF, Plaintiff and Respondent, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Appellant.	B213538 (Los Angeles County Super. Ct. No. BS113915)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Reversed.

Edmund G. Brown, Jr., Attorney General, Alicia M.B. Fowler, Assistant Attorney General, Elizabeth Hong and Jennie M. Kelly, Deputy Attorneys General, for Defendant and Appellant.

Law Offices of Ronald A. Jackson and Ronald A. Jackson for Plaintiff and Respondent.

The Department of Motor Vehicles (DMV) suspended Kevin James Overturf's (Overturf's) driver's license after he failed to complete a breath test. Overturf filed a petition for writ of mandate, and the trial court granted Overturf's petition. The DMV appeals, arguing that although Overturf may have attempted to complete a breath test, his failure to complete the test amounted to a refusal and justified revocation of Overturf's driver's license.

We agree with the DMV and reverse the trial court judgment. Consistent with Vehicle Code section 23612,[1] Overturf was properly and adequately admonished by the arresting deputies. The arresting officers had no duty to explain to Overturf that he failed to complete the breath test; no additional admonishments or elaboration on the section 23612 admonishment were required.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts

On September 2, 2007, at approximately 1:00 a.m., Los Angeles County Sheriff's Deputy Alex Vaziri was on patrol. He observed a vehicle traveling 25 to 30 miles per hour over the speed limit. The vehicle also made erratic lane changes and weaved between lanes. Deputy Vaziri made a traffic stop.

Overturf was driving the vehicle. When Deputy Vaziri contacted Overturf, he noted that Overturf had bloodshot/watery eyes, smelled of alcohol, and slurred his speech; also, Overturf appeared dazed and was slow in answering questions. When asked, Overturf admitted that he drank "3 scooners of Bud Light."

Deputy Mark Perkins then arrived to assist Deputy Vaziri. Overturf took a Preliminary Alcohol Screening (PAS) Test with results of .153 and .153 percentage blood alcohol concentration. Overturf also took and failed various field sobriety tests (FSTs), including a Romberg balance test, the walk and turn test, the one leg stand test, the finger to nose test, and the horizontal gaze nystagmus test.

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[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

Based on the objective symptoms of intoxication, Overturf's admission of drinking, the PAS reading, and Overturf's failure on the FSTs, Overturf was arrested for driving under the influence of alcohol.

Overturf was transported to the Santa Clarita Sheriff's Station. Deputy Vaziri admonished Overturf that he was required to take a chemical test pursuant to sections 13353 and 23612. Overturf attempted to take a breath test; however, after two attempts, he failed to complete the test. The first time he provided "short, shallow breaths into the mouthpiece"; the second time he "burp[ed]" into the mouthpiece. Deputy Perkins admonished Overturf again as to the chemical test requirements and asked if he wanted to submit to a blood test. Overturf responded that he did not understand why he was being asked to take a blood test after submitting to a breath test and stated that he wanted to speak to a lawyer. An administrative per se suspension/revocation order and temporary driver's license was issued.

2. Administrative Hearing

Overturf requested an administrative hearing to contest the suspension of his driver's license. The hearing was held on February 19, 2008. The DMV hearing officer concluded that Overturf was lawfully arrested, was appropriately admonished that he had an obligation to take and complete a chemical test, and that Overturf refused to take a chemical test. Overturf's driver's license was suspended for one year.

3. Overturf's Petition for Writ of Mandate

Overturf timely filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5. The DMV answered and responded to Overturf's petition.

a. *August 25, 2008, Hearing*

At the initial hearing, the trial court's tentative ruling was to grant Overturf's petition. After hearing oral argument, however, the trial court continued the matter and requested additional briefing on the following: "The sole issue to be addressed, is the officer's obligation to inform an arrestee that he or she has failed to complete? I guess related to that is the secondary issue presented which is, is a failure to complete done when the person actually fails to complete and the officer need do no more? Because if

he was obligated to do more, there would have been findings that he didn't do enough." In other words, the trial court asked the parties to "essentially defin[e] what is a failure to complete."

b. *October 23, 2008, Hearing*

At the continued hearing, the trial court reminded the parties that the matter was on calendar "for supplemental briefing with respect to the issue of whether there is any—I guess it was framed as whether the deputy sheriff has any obligation to inform Mr. Overturf that he had not completed his chosen test. [¶] I don't think there is any obligation to inform him; on the other hand, there has to be a showing of willful refusal. The evidence in the record is clear that he didn't willfully refuse; he thought he had completed. [¶] Whether or not there is a duty by the deputy to advise him of anything, if the deputy does not advise him, and there is nothing that shows he knew that he had not completed the breath test, it is not a refusal. That is my analysis."

After discussion with counsel for the DMV, the trial court stated: "I withdraw the willful refusal analysis, but I think he has to have knowledge that he didn't complete in order to refuse, and he didn't have knowledge. So as modified, the tentative is adopted as the order of the court."

4. Judgment and Appeal

Judgment was entered granting Overturf's petition for writ of mandate, and the DMV's timely appeal ensued.

DISCUSSION

I. Standard of review

The parties dispute the appropriate standard of review. We agree with the DMV. We review the trial court's legal determinations de novo. (*Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1184.) We review the trial court's factual determinations for substantial evidence. (*McDonnell v. Department of Motor Vehicles* (1975) 45 Cal.App.3d 653, 658.)

II. Applicable law

Section 23612, subdivision (a)(1)(A) provides, in relevant part: "A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153." Essentially, "[this] section creates an implied consent to a chemical test—blood, breath or urine—on the part of a driver suspected of driving under the influence of intoxicating liquor." (*McDonnell v. Department of Motor Vehicles*, *supra*, 45 Cal.App.3d at p. 656.) If an individual refuses to take a chemical test as required by section 23612, the DMV is authorized to suspend that person's driver's license pursuant to section 13353.

Section 23612 also requires that certain advisements be made prior to an arrestee being offered a chemical test. These include: (1) the arrestee shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a license suspension, among other things; (2) the arrestee shall be told that the he or she has a right to a choice of whether the test shall be of his or her blood or breath; and (3) the officer shall advise the arrestee that he or she does not have the right to have an attorney present for purposes of the chemical test. (§ 23612, subds. (a)(1)(D), (a)(2)(A), & (a)(4); *McDonnell v. Department of Motor Vehicles*, *supra*, 45 Cal.App.3d at p. 656.)

"'Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity.' [Citation.] '[In] construing a statute the courts may consider the consequences that might flow from a particular interpretation. They will construe the statute with a view to promoting rather than to defeating its general purpose and the policy behind it.' [Citation.] Remedial statutes such as section 13353 'must be liberally construed to effect their objects and suppress the mischief at which they are directed. They should not be given a strained construction that might impair their remedial effect.' [Citation.]" (*Bush v. Bright* (1968) 264 Cal.App.2d 788, 792.)

"There is a strong public policy against the nightmare of drunk driving. Thus, the implied consent law should be liberally construed to effect its purpose[s]." (*Carrey v. Department of Motor Vehicles* (1986) 183 Cal.App.3d 1265, 1270.) It follows that "[a] court should not read into a remedial statute an exception that would impose obstacles to the achievements of its purposes." (*McDonnell v. Department of Motor Vehicles, supra*, 45 Cal.App.3d at pp. 662–663.)

III. Overturf was properly admonished and failed to complete a breath test

After being arrested, Overturf was properly admonished as to the chemical test requirements. He tried to take a breath test, but failed to provide an adequate breath sample.

An unsuccessful attempt to complete a breath test amounts to a refusal. "Compliance with the implied consent law [citation] consists of completing, not merely attempting, one of the three blood alcohol content tests offered." (*Miles v. Alexis* (1981) 118 Cal.App.3d 555, 559.) "If the driver elects to take one of the three tests, he must complete the test or he will be deemed to have refused and failed to take it." (*Skinner v. Sillas* (1976) 58 Cal.App.3d 591, 598.) "'Public policy dictates that the suspected drunken driver not be allowed to evade giving the best evidence of his offense by the pretext of partial compliance.'" (*Cole v. Department of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875.)

IV. Overturf was provided a second admonishment and a second opportunity to take a blood test and refused

Section 23612, subdivision (a)(2)(A) provides, in relevant part: "If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test."

Consistent with this statute, the deputies provided Overturf an additional opportunity to take a chemical test after he failed to complete the breath test. As set forth in the videotape, one officer read from certain paperwork and/or forms and provided

Overturf with the requisite admonishment.[2] He concluded by advising Overturf that if he could not complete a test, he must submit to a remaining test. The officer then asked Overturf whether he wanted to take a blood test. Instead of replying "yes" or "no," Overturf attempted to engage the officer in conversation and stated that he had already taken three breath tests. Staying on track, the officer repeated his question. Overturf asked whether "this [would] jeopardize [his] license." The officer again informed Overturf that he needed to respond "yes or no. Would you like to take a blood test?" Overturf replied by asking to speak to his lawyer, and the officer stated "okay." At that point, the matter was concluded.[3] His request to speak to an attorney prior to taking the chemical test amounted to a refusal. (*Pepin v. Department of Motor Vehicles* (1969) 275 Cal.App.2d 9, 10.)

On appeal, as in the trial court, Overturf argues that the officers deliberately withheld "crucial information" from him, namely that he had failed to provide an adequate sample to complete the breath test. He claims that their conduct led to his confusion and denied him adequate information or understanding to make a sound decision regarding whether to submit to a blood test.[4] We cannot agree.

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[2] While his tone of voice may have been "monotone," as the dissent indicates, it is clear that the officer was simply reading the requisite paperwork without theatrics.

[3] The dissent is distracted by dialogue between Overturf and another officer that occurred *after* the first officer read the required admonishment and Overturf refused to submit to a remaining chemical test. This discussion, which is not transcribed in the appellate record, is irrelevant. At the risk of sounding redundant, the officer read Overturf the admonishment and Overturf refused to submit to a blood test. The conversation that took place thereafter is irrelevant and does not change our analysis. If anything, that conversation affirms our conclusion that when advising arrestees of their rights and responsibilities, officers should not stray from the requisite admonishment.

[4] The dissent asserts that "Overturf offered to take a blood test" and "Overturf ultimately acquiesced to a blood test and refused only when the deputies interrupted him and declined to answer his repeated inquiries as to why an additional test was necessary." (Dis. Opn., *post*, at pp. 4, 6.) We disagree with this interpretation of what Overturf stated on the videotape. At the administrative hearing, the hearing officer confirmed with

The arresting officers were not required to provide Overturf with any advisement beyond what is set forth in section 23612. As noted in *Lampman v. Department of Motor Vehicles* (1972) 28 Cal.App.3d 922, 927–928: "We decline to create further admonitions for the arresting officer to deliver to the arrested person when the latter is asked to submit to a chemical test, for if the field administration of section 13353 is made too complicated and too liturgistic its whole purpose will have been defeated." After all, "there is no duty imposed upon the officer demanding the test to explain the niceties of the implied consent law." (*Maxsted v. Department of Motor Vehicles* (1971) 14 Cal.App.3d 982, 987.)

Moreover, the arresting officer read the required admonishment, stating: "If you cannot, or state you cannot, complete the test you choose, you must submit to and complete a remaining test." From this mandated admonishment, we can infer, as Overturf should have inferred, that he failed to complete the breath test.

Hildebrand v. Department of Motor Vehicles (2007) 152 Cal.App.4th 1562 is dispositive. In that case, the arresting officer told the arrestee that he had a choice of tests; the arrestee chose a breath test but was unable to complete it. After the failed test, the officer read the arrestee the admonishment about implied consent. The arrestee argued that he was not "'warned that his failure to provide an adequate breath sample or his failure to complete one of the required tests would result in the suspension of his driving privileges until *after* he had attempted to complete one of the tests at the direction of the arresting officer.'" (*Id.* at p. 1573.) The Court of Appeal was not convinced, finding that the arresting officer "was required only to inform [the arrestee] that he had a choice of tests to take, prior to administering any test, and [the arresting officer] did

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Overturf that the deputies asked him whether he wanted to complete a blood test. The hearing officer then inquired: "[D]id you at any time say yes?" Overturf replied that he did not. He even so admits in his respondent's brief. He frames the issue on appeal as: "Where a driver who is arrested for violation of Vehicle Code section 23152 agrees to take a breath test but is not advised that he had failed to complete it, does his *subsequent refusal* to take a different test constitute an excusable failure to submit to a chemical test . . . ?" (Italics added.) And, we must state the obvious: If Overturf had consented to a blood test, the officers presumably would have given it, and this issue would not be on appeal.

inform [the arrestee] of this choice. [Citation.] [The arrestee] understood a test was required and made several attempts but failed to complete the breath test. [The arresting officer] then read the refusal admonishment to [the arrestee]. This reasonably satisfied the purpose of the required admonishment as there was no need to repeat it for each test." (*Id*. at pp. 1573–1574.)

That is exactly what occurred here. The arresting deputies admonished Overturf, and he chose to take a breath test. After several attempts, which consisted of short, shallow breaths and burping, he failed to provide an adequate sample. He was admonished again and offered a blood test. Instead of submitting a blood sample, he requested an attorney. The requirements of section 23612 were satisfied.

Throughout his respondent's brief, Overturf suggests that his request to speak to a lawyer evidences his confusion regarding the admonitions given by the arresting deputies. In support, he offers case law regarding the contemporaneous administration of a warning pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) with the section 13353 admonition. (See, e.g., *McDonnell v. Department of Motor Vehicles*, *supra*, 45 Cal.App.3d at p. 658 ["If a driver who has been given *Miranda* insists on the presence of an attorney before choosing a test the courts have recognized that he may have been confused by the two warnings and the officer's failure to clarify and explain the difference. In such a case the refusal to take a test has been held not to be a refusal within the meaning of said section 13353"]; *Cole v. Department of Motor Vehicles, supra,* 139 Cal.App.3d at p. 872; *Rust v. Department of Motor Vehicles* (1968) 267 Cal.App.2d 545, 547.) These cases do not aid Overturf as he does not argue or explain how the holdings of these cases are applicable. How could they be? There is no indication that the arresting deputies administered a *Miranda* warning to Overturf or otherwise advised him of a right to counsel. In fact, the appellate record indicates otherwise. The advisement given specifically provides: "You do not have the right to talk to an attorney or have an attorney present before stating whether you will submit to a test, before deciding which test to take, or during the test." Notably, Overturf offers no

legal precedent expanding the scope of the holding of these cases, and we decline to do so.

Dunlap v. Department of Motor Vehicles (1984) 156 Cal.App.3d 279 (*Dunlap*) does not compel a different result. In *Dunlap*, the driver was arrested for driving under the influence of alcohol. (*Dunlap, supra*, at p. 281.) He was properly admonished and refused to take any test whatsoever. (*Ibid*.) After his initial refusal, "the arresting officer then read to [Dunlap] the complete admonition pursuant to California Vehicle Code section 13353." (*Ibid*.) Dunlap refused to submit to any of the three tests. (*Id*. at p. 282.)

Later, en route to the county jail, Dunlap informed the police officer that he wanted to submit to a breath test. (*Dunlap*, *supra*, 156 Cal.App.3d at p. 282.) But, he refused to cooperate in the taking of the breath test and later refused to submit. (*Ibid*.)

The officer again asked Dunlap if he wanted to submit to a blood test. He refused. (*Dunlap*, *supra*, 156 Cal.App.3d at p. 282.) After further discussion, the officer reoffered the urine test, and Dunlap consented. (*Ibid*.) But, of course, he was unable to complete the urine sampling. Dunlap was reported as having refused to comply and his driver's license was suspended. (*Ibid*.)

Dunlap filed a petition for writ of mandate, and the trial court granted his petition, ruling that the arresting officer was required to "'reoffer'" to Dunlap the opportunity to submit to a further blood test after he failed to complete the urine test. (*Dunlap*, *supra*, 156 Cal.App.3d at p. 282.) The Court of Appeal reversed. "There is no provision in Vehicle Code section 13353 requiring an arresting officer to provide extra admonitions or opportunities to complete any chemical testing once the original three tests have been refused." (*Dunlap, supra*, at p. 283.)

Certainly Dunlap "knew" he had not completed any of the three tests. He refused to provide a breath test; he was "unable to complete the urine sampling"; and he did not submit to a blood test. (*Dunlap, supra*, 156 Cal.App.3d at p. 282.) But that did not factor in the Court of Appeal's analysis or conclusion.

In urging us to affirm, Overturf relies heavily upon *Gobin v. Alexis* (1984) 153 Cal.App.3d 641 (*Gobin*). That case actually supports the DMV. In *Gobin*, the driver was

arrested for driving under the influence of alcohol, in violation of section 23152, subdivision (a). (*Gobin, supra,* at p. 644.) He was taken to the police station, and, upon arrival, the arresting officer informed him of the chemical test requirements of section 13353. (*Gobin, supra,* at p. 644.) The driver chose to submit to a breath test. Following three widely-diverging test results, the officer determined that the machine was not working. "Stating that he believed the machine was malfunctioning, the officer then advised [the driver] that he could either take a breath test at [another police station], where the machines were in proper order," or he could take a urine sample or blood test at the same police station. (*Id.* at p. 645.) The driver replied: "'I have already given you three tests. I am not doing any more.'" (*Ibid.*) The officer informed the driver "that failure to take another test would result in loss of his driver's license." (*Ibid.*)

Following a hearing, the DMV suspended the driver's driving privileges. (*Gobin, supra,* 153 Cal.App.3d at p. 645.) His petition for writ of mandate was denied. (*Id.* at p. 646.) On appeal, the court affirmed the trial court judgment. (*Id.* at p. 651.)

First, the court reiterated the well-established principle set forth above: "By the enactment of . . . section 13353, both the People and the defendant are entitled to a *completed* chemical test, and the motorist must submit to and complete the same." (*Gobin, supra,* 153 Cal.App.3d at p. 646.) Later, the court concluded that "[t]here [was] no merit to [the driver's] argument that by merely blowing into the machine three times, he had completed the required test. Such an interpretation allowing a test to be deemed completed, regardless of whether the breath samples were able to be analyzed or whether the machine was functioning properly, violates the purpose of . . . section 13353 . . . which is to obtain the best evidence of the alcoholic content of the motorist's blood at the time of arrest and to provide a fair, efficient and accurate system of determining the motorist's blood alcohol content. [Citation.]" (*Id.* at p. 649.) In so holding, the court affirmed that "[c]ompliance with the provisions of the implied consent statute requires that the arrestee complete, not merely attempt, one of the three possible tests." (*Ibid.*)

The court went on to find that the driver's failure to complete the breath test at the one police station coupled with his failure either to complete the breath test at a different

police station or to select and complete a different test at the first police station amounted to a refusal to submit to a chemical test in violation of section 13353, subdivision (b). (*Gobin*, *supra*, 153 Cal.App.3d at p. 650.)

Just as in *Gobin*, Overturf's failure to complete a chemical test constituted a refusal, justifying suspension of his driver's license. Overturf's argument notwithstanding, nothing in *Gobin* suggests that the arresting officer was required to inform Overturf that the machine malfunctioned or the fact that he did somehow ameliorated any confusion the driver in *Gobin* would otherwise have suffered.

We likewise reject Overturf's reliance upon *Joyce v. Department of Motor Vehicles* (1979) 90 Cal.App.3d 539 (*Joyce*). In *Joyce*, the arrestee provided two breath samples, only one of which registered a valid result. (*Id*. at p. 542.) "After [the arrestee] breathed into the breathalyzer the first time, and before he breathed into it the second time, the officer told [him] that two breath samples were required." (*Id*. at p. 543.) Because only one of the initial two samples provided registered a result, the officer requested that the arrestee provide a third sample; the arrestee refused. The DMV suspended his driver's license, and the trial court granted the arrestee's petition for writ of mandate. (*Id*. at pp. 540, 542.)

The Court of Appeal affirmed the trial court's judgment, finding that because the officer had informed the arrestee that he was required to submit two breath samples, once the arrestee had done so, he reasonably believed that the test was completed. Thus, one could reasonably conclude that the arrestee had been confused or misled by the officer. (*Joyce*, *supra*, 90 Cal.App.3d at p. 543.) In contrast, here the officer did not say anything that could have misled Overturf into thinking that he had completed a breath test. Instead, the officer's conduct and statements—namely the readmonishment—indicate that Overturf had not completed the requisite chemical test.

Notably, the officer's provision of extra information in *Joyce* (that the arrestee was required to submit two breath samples) backfired. As a result of the officer's additional statement, the arrestee was under the false impression that he had completed the chemical test, when in fact he had not. (*Joyce*, *supra*, 90 Cal.App.3d at p. 543.) The holding in

Joyce bolsters the strong public policy reasons against encouraging officers to provide their own informal elaboration or explanation of the implied consent requirements. Case law demonstrates that when officers deviate from the formal admonishment, they tend to be inaccurate in their explanation as to what exactly implied consent requires. (*Decker v. Department of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906.)

For that reason, among others, an officer is simply required to read the chemical test admonition of section 23612 to an arrestee. That is exactly what the deputy did here. As set forth above, following the second admonishment, Overturf asked to speak to an attorney, thereby refusing to complete a chemical test. Because he refused to complete a chemical test, the DMV lawfully suspended Overturf's driver's license pursuant to section 13353. One final comment: This result is not unfair to Overturf. Rather, what would be unfair would be to require arresting officers to guess what information should be provided to an arrestee in addition to the requisite Vehicle Code admonishment. (See, e.g., *Lampman, supra,* 28 Cal.App.3d at pp. 927–928.) Nothing in the Vehicle Code suggests that an arresting officer should embellish upon the mandated admonishment as he or she sees fit, depending upon the circumstances.

DISPOSITION

The judgment of the trial court is reversed. The DMV is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

I concur:

_____, P. J.
BOREN

DOI TODD, J.—Dissenting

I dissent. I would affirm the trial court's order granting the petition for writ of mandate. I do not agree with the majority's conclusion that the record established appellant Kevin James Overturf refused to complete a chemical test, warranting the one-year suspension of his driver's license. Rather, I agree with the trial court that an arrestee must have knowledge that he did not complete a test in order to demonstrate a refusal, and the record here failed to establish such knowledge.

The Vehicle Code provides that one who is lawfully arrested for driving while intoxicated must submit to one of three designated chemical tests. (Veh. Code, § 23612, subd. (a)(1)(A).)[1] Prior to submitting to a chemical test, an arrestee must receive certain advisements, including "that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year" (§ 23612, subd. (a)(1)(D)); that the person has the choice of whether the test shall be of his or her blood or breath (§ 23612, subd. (a)(2)(A)); and that there is no right to an attorney at any stage of the chemical testing process (§ 23612, subd. (a)(4)). According to section 13353, subdivision (a)(1), an arrestee's driver's license may be suspended for one year "[i]f a person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23612 . . . ."

Here, the trial court found that the record failed to show that Overturf refused to take a chemical test. "The question whether a driver 'refused' a test within the meaning of the [Vehicle Code] is a question of fact." (*Cahall v. Department of Motor Vehicles*

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[1] Unless otherwise indicated, all further statutory references are to the Vehicle Code.

(1971) 16 Cal.App.3d 491, 497.) Our review is therefore confined to examining whether substantial evidence supported the trial court's findings. As explained in *Thompson v. Department of Motor Vehicles* (1980) 107 Cal.App.3d 354, 358 (*Thompson*): "When the trial court has employed the independent judgment test in an administrative mandate proceeding, evidentiary review at the appellate level is confined to a determination whether the trial court's findings are supported by substantial evidence. [Citation.] The appellate court focuses on the findings of the trial court, rather than those of the administrative agency [citation]. The judgment will be upheld if there is any substantial evidence in support of each of the trial court's essential findings; all contrary evidence will be disregarded on appeal [citation]." (Fn. omitted; accord, *Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 372; *Gobin v. Alexis* (1984) 153 Cal.App.3d 641, 646.) Pursuant to this standard of review, the appellate court is precluded from drawing inferences contrary to the reasonable inferences drawn by the trial court. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631; *Rees v. Department of Motor Vehicles* (1970) 8 Cal.App.3d 746, 751.)

"California courts have stated that if a driver's refusal to take a test required by section 13353 is engendered by confusing or misleading statements by the arresting officer and not engendered by the driver's self-impaired ability to understand, then the driver's refusal is vitiated so that his driver's license may not be suspended. [Citations.]" (*Joyce v. Department of Motor Vehicles* (1979) 90 Cal.App.3d 539, 543 (*Joyce*).) "'In determining whether the arrestee's refusal is the result of confusion, the crucial factor is not in the state of the arrestee's mind; it is the fair meaning to be given his response to the demand that he submit to the chemical test.' [Citation.]" (*Gobin v. Alexis, supra,* 153 Cal.App.3d at p. 650.) In *Joyce*, for example, arrestee Joyce elected to take a breath test. (*Joyce, supra*, at p. 542.) After Joyce breathed into the machine once and the machine did not produce a reading, the officer informed Joyce that two breath samples were required. (*Id*. at p. 543.) Joyce breathed into the machine one more time, but refused when the officer asked for a third breath. (*Ibid*.) The court concluded that the fair

meaning to be given these circumstances was that Joyce believed he had done all that was required and was confused or misled by the officer. (*Ibid.*)

Contrary to the majority's interpretation of *Joyce* that the arrestee's confusion resulted from the officer providing more information than required—i.e., stating that two breath samples were necessary—the court in *Gobin v. Alexis, supra,* 153 Cal.App.3d 641, explained that the confusion stemmed from the officer's failure to disclose that the machine had not registered the first breath. There, after the arrestee provided three breath samples, the officer informed him that the gas chromatograph intoximeter was not functioning properly and directed him to take an alternative test. (*Id.* at pp. 644–645.) The arrestee refused. (*Id.* at p. 645.) Rejecting the arrestee's argument that he was not required to submit to further testing, the court determined that his refusal was premised on the mistaken belief that he need only take one test as opposed to any mistake or confusion engendered by the officer's comments. (*Id.* at p. 650.) In reaching this conclusion, the court expressly endorsed the officer's disclosing to the arrestee that the machine was not working, stating: "When the officer correctly determined that the machine was malfunctioning, he properly informed the defendant of that fact, contrary to what the officer had done in the *Joyce* case." (*Id.* at p. 649.)

Here, substantial evidence supported the trial court's determination that Overturf's refusal to take a blood test was vitiated because he received no information to indicate that he had not completed the breath test. The trial court explained that the record showed "Overturf agreed to, and did submit to a breath test. The record does not show that he knew the test was incomplete. When asked to perform an additional test (without being told that the breath test hadn't worked), Overturf expressed a willingness to take the test if it would 'clarify' things. He did not refuse to take the blood test until the deputy refused to provide him with any information to make a knowing, informed choice." In view of the trial court's factual findings, this Court lacks the power—as the majority has done—to draw the contrary inference that Overturf should have understood the admonishment to suggest he had not completed a test. (E.g., *Rees v. Department of Motor Vehicles, supra*, 8 Cal.App.3d at p. 751 ["Even though the evidence supports a

contrary inference, the judgment must be sustained under the well-established rule that on appeal those inferences in support of a finding will be accepted whereas those in support of a contrary conclusion will be rejected"].)

As a key basis for its factual findings, the trial court indicated that it had viewed a videotaped recording of Overturf's exchange with the deputies who admonished him and asked him if he would "like" to take a blood test. I, too, have carefully viewed the videotape and find an ample basis for concluding that the exchange was confusing and misleading. At the beginning of the exchange, a deputy informed Overturf that he was required to submit to a chemical test and further informed him that he had a choice of a breath or blood test. Immediately thereafter, however, the deputy stated: "Since the breath and blood tests are unavailable, you are deemed to have given your consent to chemical testing of your urine." At that point, there is a pause in the exchange and another deputy who is not pictured in the videotape corrects the first deputy, stating: "You don't have a choice to give a urine test."

After Overturf received that conflicting information, the first deputy read to Overturf the consequences he would suffer if he refused to submit to or failed to complete a test. The admonition was lengthy and monotone and included information about the consequences of receiving second and third offenses within a 10-year period. At the conclusion of the recitation, the deputy stated: "If you cannot complete the test you choose you must submit to complete a remaining test. Would you like to take a blood test?" The deputy repeated the question multiple times in response to Overturf's answer that he had taken three breath tests and his question as to whether this would jeopardize his license. When Overturf then stated that he did not understand what was going to happen, the second deputy took over, brusquely stating: "What is it you don't understand? He just read you the whole thing." In the exchange that followed, Overturf attempted to explain what he did not understand, but the second deputy repeatedly interrupted him, even when Overturf offered to take a blood test:

"Overturf: I do not understand what the ramifications are or what's going on. I've given three breath tests . . .

"Second Deputy: He just read you, if you are convicted of a DUI with a refusal there's additional fines and time spent in jail.

"Overturf: I have given two breath tests since . . .

"Second Deputy: Do you understand what the ramifications are?

"Overturf: I do not.

"Second Deputy: I just told you. You are looking at extra time and extra fines [background noise of door opening and closing] and one year revocation of your driver's license.

"Overturf: I just stated that I've given more than two breath tests and I've given . . .

"Second Deputy: Would you like to give a blood test now?

"Overturf: If that clarifies what's going on besides giving three tests now, one in the field, two in the office . . .

"Second Deputy: Okay. The answer is going to be yes or no. Would you like to take a blood test?"

At that point, Overturf asked to see his lawyer, to which the second deputy sarcastically responded: "Okay. When you get out of here you make sure you contact your lawyer."

In light of this evidence, *Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562 (*Hildebrand*) is not dispositive. There, after arrestee Hildebrand provided one breath sample, he tried six times to complete a second sample. After the sixth attempt, Hildebrand said: "'I'm blowing as hard as I can. If that's not good enough . . . too bad. And I'm not taking any other tests.'" (*Id.* at p. 1566.) Thereafter, the officer expressly informed Hildebrand "that he was still required to submit a sample and because he could not complete the breath test, he was required to give a blood sample." (*Ibid.*) Hildebrand responded with an expletive and engaged in a tirade while the officer admonished him about the consequences of a refusal. (*Id.* at pp. 1566–1567.) The appellate court rejected Hildebrand's argument that he was inadequately admonished because the officer read the refusal admonishment to Hildebrand only after he failed to complete his chosen test. (*Id.* at pp. 1573–1574.) Importantly, the court found that

substantial evidence supported the trial court's finding that Hildebrand refused a chemical test because the record showed that he did not voluntarily submit to and complete one of the offered tests. (*Id.* at p. 1574.)

The record here painted a distinctly different picture than that in *Hildebrand.* Unlike arrestee Hildebrand, Overturf was cooperative and did not initially refuse to take any type of chemical test. Unlike the evidence in *Hildebrand* which showed that Hildebrand understood that his breath test efforts were not "good enough," there was no evidence here to suggest that Overturf knew his two breath tests had not resulted in viable samples. (See *Hildebrand, supra,* 152 Cal.App.4th at p. 1566.) Unlike the officer in *Hildebrand* who stated that a blood test was necessary because Hildebrand had not completed the breath test, neither of the deputies who participated in admonishing Overturf informed him that they were requesting a blood test because he had not completed the breath test. (*Ibid.*) Finally, unlike Hildebrand who refused a blood test having knowledge that he had not completed a breath test, Overturf ultimately acquiesced to a blood test and refused only when the deputies interrupted him and declined to answer his repeated inquiries as to why an additional test was necessary.

Under these circumstances, I would find that substantial evidence supported the trial court's determination that the fair meaning to be accorded to Overturf's response to the request for a blood test was not a refusal within the meaning of section 13353. In reaching this conclusion I do not mean to suggest that any additional burden should be imposed on an officer when admonishing an arrestee about the consequences of a refusal. I recognize that "there is 'no duty imposed upon the officer demanding the test to explain the niceties of the implied consent law' [citation]." (*Thompson, supra,* 107 Cal.App.3d at p. 362.) Nonetheless, "the burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver." (*Id.* at p. 363.) Given that Overturf had submitted to a breath test, the statutory advisement regarding the consequences of failing to submit to or complete a chemical test was meaningless to Overturf absent any evidence that he was aware he had not completed the test. I agree

with the trial court that substantial evidence showed Overturf cannot be deemed to have refused to complete a chemical test. He should not suffer the suspension of his license.

_____, J.

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